Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE COMPANY,
Petitioner,

v.

EVELYN CROCKER
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

RESPONSE TO SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cases: **Page**

BMW of North America, Inc. v. Gore, No. 94-896 (May 20, 1996) ..... *passim*
Life Ins. Co. of Georgia, No. 1940357, 1996 Ala. LEXIS 110, (Apr. 23, 1996) 5
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 2

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Pursuant to Rule 15.8 of the Rules of this Court, respondent Evelyn Crocker respectfully submits this brief in response to the supplemental brief of petitioner addressing the implications of *BMW of North America, Inc. v. Gore*, No. 94-896 (May 20, 1996). It is plain that *BMW v. Gore* only *strengthens* the decision of the state supreme court in this case. Petitioner can invoke *BMW v. Gore* only by mischaracterizing the nature of its liability and the decision below. The petition for writ of certiorari should be denied.

1. The gravamen of petitioner's argument is that it has been punished for entirely legitimate conduct that it never had any basis to believe was wrongful. Pet. Supp. Br. 2. Petitioner's claim is utterly fanciful. Far from involving innocent, or even negligent, conduct, this case contains the aggravating factors of "'trickery and deceit'" and "intentional malice" that this Court indicated in *BMW v. Gore* are particularly "blameworthy" and call for substantial punitive damages. Slip op. at 15 (citation omitted).

Petitioner is liable for punitive damages under two theories. First, it is liable for the intentional fraud of its agent under the Alabama law of respondeat superior approved in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Petitioner cannot dispute that its agent, Sammy Taylor, knew of Coleman Crocker's heart problems and Parkinson's disease; that he knew that Coleman was uninsurable; that he nonetheless induced the Crockers to purchase a credit life insurance policy; that he failed to ask the Crockers for their medical information; and that he simply filled out the forms himself, falsely checking "NO" answers to all the relevant health questions. The Alabama Supreme Court found that the evidence showed that "Taylor had a duty to disclose to the Crockers that the policy benefits might not be paid if Mr. Crocker in fact had had health problems and that his failure to do so induced them to obtain the credit life coverage, for which premiums were paid until coverage was denied at Mr. Crocker's death." Pet. App. 6a. The evidence also showed that Union Security wantonly trained its agent. Cert. Opp. 15. Petitioner's plea of innocence ignores these uncontrovertible facts.

In addition to its vicarious liability, petitioner is liable directly for punitive damages, for Union Security adopted unlawful policies that maximized its profits but facilitated the commission of fraud. The Alabama Supreme Court found that "Union Security does not issue a written policy to those applicants who are accepted for coverage." Pet. App. 3a. Indeed, the trial court noted that "it was undisputed" that the Crockers never received "either a certificate of life insurance or a copy of the policy of credit life insurance which they had purchased." *Id.* at 17a-18a. Thus, "[o]ne can read and re-read the Statement of Debtor's Physical Condition executed by Coleman Crocker at the time he purchased credit life insurance from the defendants, and nowhere is there any indication that there is any correlation between credit life insurance coverage and the answers as set forth in the

Statement." *Id.* at 18a.

These practices were illegal under Alabama law. Opp. Cert. 15. Indeed, Union Security's claims manager testified at trial that he had "been made aware, possibly," of the company's violation of Alabama law. R. 433.

Petitioner's illegal policies facilitated the commission of fraudulent acts by its agents. The failure to provide insureds with written copies of their policies made it difficult, if not impossible, for the insureds to protect themselves against the predations of petitioner's agents. Moreover, Union Security employs no safeguards whatsoever to ensure that its agents accurately fill out the health questions on its medical statement. R. 444.

The record shows that, by employing lax screening procedures and maximizing sales of credit life insurance, Union Security earns immense profits. "[T]he loss ratios of Union Security with First Alabama through these four years [1988, 1989, 1990, and 1991] were, respectively, 20.6%, 21.1%, 16.3%, and 17.0%." Pet. App. 8a-9a. Expert testimony established that a 50% loss ratio was typical for other companies and represented "a more reasonable balance between the insurer and the insureds." *Id.* at 9a. (Petitioner's far-fetched claim that it was the "target, not the perpetrator, of the fraud" (Pet. Supp. Br. 3) thus cannot be squared with the decisions of the Alabama Supreme Court and the trial court.)

Petitioner's only excuse is that it is "proper" to deny coverage because of misstatements or omissions in an insurance application that, if corrected, would have led the insurer to deny coverage in the first instance. Pet. Supp. Br. 2. The short answer to this excuse is that petitioner was not punished on such a basis. Petitioner was punished for the intentional fraud of its agent and for its own illegal policies that facilitated the fraud. No decision of any Alabama court, or of any other court, suggests that this type of conduct by an insurance company is permissible.

2. Petitioner next tries to invoke *BMW v. Gore* by asserting that "the harm caused was solely economic." Pet. Supp. Br. 3. To the contrary, petitioner's fraud threatened respondent — a 50-year-old recent widow of modest means — with the imminent foreclosure of her house, a mobile home that she shared with her 16-year-old daughter. Opp. Cert. 9-11. Only a loan from her attorneys prevented her from losing her home.

In fact, respondent sued for and recovered damages for mental anguish. Thus, an unknown, but surely substantial, portion of the $2 million award before this Court reflects compensation for emotional distress rather than punitive damages. Opp. Cert. 8-12.

3. Petitioner also attempts to attack the ratio between punitive and compensatory damages. Pet. Supp. Br. 3. But because petitioner failed to seek itemization of the components of the damage award at trial (Opp. Cert. 9), the exercise of computing a ratio is purely speculative. Moreover, *BMW v. Gore* suggests that a high ratio between punitive and compensatory damages would be appropriate here, in light of the severe potential harm — loss of her home — that would have befallen respondent but for her attorney's intervention:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, *a particularly egregious act has resulted in only a small amount of economic damages*. A higher ratio may also be justified in cases in which the *injury is hard to detect* or the monetary value of noneconomic harm might have been *difficult to determine*.

Slip op. 22-23 (emphasis added). In addition, the essence of fraud is that it is difficult to detect, and a substantial award is necessary to account for the probability of under-enforcement.

4. Petitioner further charges that the award is unreasonable by comparison to legislative penalties. Petitioner compares the award here to the penalty for ordinary consumer fraud under the Alabama Deceptive Trade Practices Act. Pet. Supp. Br. 4. But this statute does not represent "'a legislative judgment concerning appropriate sanctions *for the conduct at issue*.'" *BMW v. Gore*, slip op. at 23 (emphasis added and citation omitted). The Alabama courts have expressed a special concern with the sort of *insurance fraud* at issue here. *See Life Ins. Co. of Georgia*, No. 1940357, 1996 Ala. LEXIS 110, slip op. at *18 (Apr. 23, 1996) ("The class of plaintiffs Life of Georgia preyed upon were from a group of citizens that need the most protection: elderly, uneducated, and low income."). The Alabama courts have not restricted awards in insurances cases to the statutory penalties for ordinary consumer fraud. In fact, they have suggested that no such comparison is apt, for "Alabama citizens who become the victims of fraud have little recourse other than through litigation. . . . [T]he State Insurance Department has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have." *Id* at *21.

5. Petitioner has conceded that this case presents no question of extraterritorial punishment. The punitive award against Union Security was based solely on its conduct and solely on its intentional fraud of the Crockers. This case therefore does not involve the principle that a single State may not "impose its own policy choice on neighboring States." *BMW v. Gore*, slip op. at 10.

Petitioner contends that "there is no reason to believe — and petitioner [sic] makes no effort to pretend — that any State other than Alabama" would impose punitive damages on the basis of the conduct at issue here. Pet. Supp. Br. 2. That is simply untrue. Intentional fraud is tortious in every State. And intentional torts have been the basis of punitive damage awards for centuries.

Petitioner's argument is a transparent attempt to distort the facts of this case and to reargue the underlying liability question of state law that was settled by the Alabama courts and which is not before this Court. Moreover, petitioner's argument is inconsistent with *BMW v. Gore*: just as Alabama may not impose its policy choices on other States, so they may not impose their choices on Alabama.

The petition for writ of certiorari should be denied.

Respectfully submitted.

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